Howard Eisenberg, Dean of Marquette University Law School, provided a sample Anders brief in his course materials for the three federal criminal appellate practice seminars (sponsored by the Seventh Circuit) held in May and June of 1998. That brief is reproduced below.

Attorneys who wish to learn more about handling criminal appeals in the Seventh Circuit may wish to obtain a copy of the wrtten materials and view the video of the program. The course materials and video tapes of the entire program entitled "Federal Criminal Appellate Practice for the Court-Appointed Attorney" are available in the Seventh Circuit Library in Chicago (312-435-5660) and in each of the circuit's branch libraries.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

* * * * *

Case Number 97-2583

UNITED STATES OF AMERICA

Plaintiff-Appellee,

vs.

LARRY D. NIEMEIER,

Defendant-Appellant.

Appeal from the Judgment of the United States District Court for the Western District of Wisconsin. Honorable John C. Shabaz, Chief United States District Judge, Presiding
District Court Case No. 97-CR-3 S

BRIEF AND APPENDIX FOR DEFENDANT-APPELLANT LARRY D. NIEMEIER

ANDERS BRIEF

HOWARD B. EISENBERG

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ATTORNEY FOR DEFENDANT-APPELLANT

CERTIFICATE OF INTEREST

The undersigned, counsel of record for, furnishes the following list in compliancy with Circuit Rule 26:1.

1. I appear as counsel for Larry D. Niemeier, Defendant-Appellant. in this case.

2. The Defendant was represented at the time of his guilty plea and sentencing by Paul Schwartz of Madison, Wisconsin.

3. Only the undersigned attorney will appear on behalf of the Defendant in this appeal. Counsel is Dean and Professor of Law at Marquette University Law School, although this appointment is personal, and not part of counsel's duties as Dean and Professor. It is likely that students from the Marquette University Law School will provide research assistance in this case.

Dated: October 16, 1998

Respectfully submitted,

HOWARD B. EISENBERG

ATTORNEY FOR DEFENDANT-APPELLANT

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee,

vs. **Case Number 97-2583**

LARRY D. NIEMEIER,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT, LARRY D. NIEMEIER

JURISDICTIONAL STATEMENT

This is an appeal from a judgment in a criminal case entered on June 17, 1997 in the United States District Court for the Western District of Wisconsin, Hon. John C. Shabaz, Chief United States District Judge, presiding. Defendant, Larry Dean Niemeier, was convicted after a plea of guilty of one count of being a Felon in Possession of a Firearm in violation of 18 U.S.C. §922(g). Defendant was sentenced to a term of 63 months imprisonment, to be served consecutively to the sentence imposed for a parole revocation. The Notice of Appeal was filed on June 23, 1997. No post conviction motions have been filed in the District Court.

The District Court had jurisdiction of this case under 18 U.S.C. §3231, and this Court has jurisdiction of this appeal by virtue of 28 U.S.C. §1291.

ISSUE PRESENTED FOR REVIEW

Is Defendant's appeal after his guilty plea and sentence within the applicable sentencing guidelines wholly frivolous and without arguable merit within the meaning of *Anders v. California*, 386 U.S. 728 (1967)?

STATEMENT OF THE CASE

At the time of this offense, the Defendant-Appellant, Larry Dean Niemeier, was on parole following his conviction for possession with intent to distribute cocaine, in violation of 18 U.S.C. §841(a)(1), a felony. Defendant's parole had twice previously been revoked.

On November 30, 1996 Defendant was deer hunting in Iowa County, Wisconsin. Defendant was approached by two Wisconsin Department of Natural Resource wardens who observed Defendant alone in a pickup truck. Inside the truck the wardens saw a rifle which, upon examination, was loaded in violation of state law. The wardens ultimately found a total of four firearms in the truck, all of which had moved in interstate or international commerce before reaching Wisconsin.

Defendant was charged with a single count of being a felon in possession of a firearm in violation of 18 U.S.C. §922(g). A plea agreement was reached whereby the Defendant would plead guilty to the charge, and the Government would recommend the maximum possible reduction in the Guideline calculation

of sentence for "acceptance of responsibility." The Defendant entered his plea of guilty, which was accepted by Judge Shabaz.

The presentence report concluded that the applicable sentence under the Guidelines was in the range of 51 to 63 months. The District Court declined to depart from the applicable range and sentenced Niemeier to a term of 63 months. The Court ordered that the sentence in this case run consecutively to the sentence then being served by Defendant for the revocation of his parole. The parole was revoked for the same conduct which constitutes this conviction. Defendant appealed.

Counsel has obtained the complete court record in this case, including the presentence report, and all transcripts in this case. Counsel has also corresponded with the Defendant. For the reasons that follow, counsel has concluded that any further proceedings on behalf of the Defendant would be wholly frivolous and without arguable merit within the meaning of *Anders v. California,* 386 U.S. 738 (1967) and its progeny. For this reason counsel asks leave to withdraw in this case.

SUMMARY OF ARGUMENT

This is an appeal after an unconditional guilty plea. The Defendant, who was on federal parole at the time, was caught hunting with four firearms in his vehicle and was convicted of being a Felon in Possession of a Firearm. No pretrial issues were reserved for appellate review. The plea colloquy went beyond the requirements of law, and no assertion can be made that the plea was not knowingly nor voluntarily entered by the Defendant. The sentence was within the applicable Guideline range, and the imposition of a consecutive sentence is not arguably an abuse of discretion as the Defendant was on parole at the time of this offense, his parole had previously twice been revoked, and the District Court specifically indicated that it felt the Defendant should have an "incremental" sentence as punishment for violating his parole.

Although Defendant has raised the issue of the constitutionality of the statute pursuant to which he stands convicted, every court which has considered that claim, including this Court, has squarely rejected this contention.

In short, there is no issue of arguable merit in this case, and thus counsel asks leave to withdraw.

ARGUMENT

THERE IS NO COLORABLE ISSUE WHICH SUPPORTS AN APPEAL IN THIS CASE.

Following a careful review of the complete court record and transcripts in this case, including the presentence report; after corresponding with the Defendant; and after researching the law as it relates to the facts of this case; counsel has concluded that any further proceedings on behalf of the Defendant would be wholly frivolous and without arguable merit within the meaning of *Anders v. California,* 386 U.S. 738 (1967) and its progeny. In reaching this conclusion counsel has considered the following issues of possible merit, which he believes are the only possible issues raised by this record.

A. Validity of the Guilty Plea

"[A] plea of guilty constitutes a waiver of non-jurisdictional defects occurring prior to the plea," *United States v. Robinson,* 20 F.3d 270, 273 (7th Cir.1994). There are no jurisdictional defects apparent in this record, and the guilty plea was unconditional with no pretrial issue being reserved under Rule 11(a)(2) of the Federal Rules of Criminal Procedure.

Counsel ordered the June 13, 1997 plea transcript, and that transcript is now part of the record in this case. Judge Shabaz complied fully with the procedure specified in Rule 11(c) of the Federal Rules of Criminal Procedure for the acceptance of the guilty plea. The plea agreement was reduced to writing and

was spread on the record. Judge Shabaz meticulously examined the Defendant and explained to him the nature of the plea agreement, the consequences of his plea, and the sentencing options open to the Court. Pursuant to the plea agreement, the Government would recommend the maximum possible reduction in the Guideline calculation of sentence for acceptance of responsibility. The Government also indicated that it would, within its complete discretion, make a motion for a sentence reduction under Rule 35(b), F.R.Crim.P, if the Defendant provided "substantial assistance" to the Government. The Defendant indicated an understanding of the nature and consequences of his plea and the sentencing alternatives open to the Court. The Government then offered a factual basis for the plea.

In short, this is a facially valid guilty plea. Indeed, Defendant has not asserted that the plea was not voluntary or knowing.

B. Validity of Statute

Defendant has informed counsel that he believes that it is unconstitutional to make possession of a firearm by a felon a federal offense. Although this issue was never raised in the District Court, and might well be waived by the plea of guilty, counsel has considered the issue on the merits. Relying on the rationale of *United States v. Lopez*, 514 U.S. 549 (1995) Niemeier argues that 18 U.S.C. §922(g)(1) exceeds Congress' Commerce Clause authority. This Court, and every other circuit which has considered this argument, has squarely rejected this

assertion, *United States v. Bell,* 70 F.3d 495, 498 (7th Cir. 1995); *United States v. Lewis*, 100 F.3d 49, 51 (7th Cir. 1996); *United States v. Lee*, 72 F.3d 55, 58 (7th Cir. 1995); *United States v. Williams*, No. 96-2557, 1997 WL 685421, at *6, 1997 U.S. App. LEXIS 30230 (7th Cir. 10/30/97) (collecting supporting cases from other circuits).

Moreover, the factual basis presented to the Court at the time of the plea specifically established that the four firearms possessed by Defendant traveled in interstate or international commerce from Connecticut, New York, and Brazil (*Plea Transcript* at 19).

Additionally, where, as here, the defendant was serving a federal parole at the time of his possession of the firearms, a federal court has an independent basis to assert jurisdiction over the federal prisoner, even if the Commerce Clause argument had validity as applied to a felon convicted in state court.

In short, the Commerce Clause argument is without merit. The firearms actually did move in interstate commerce. There is no constitutional issue raised by this statute

C. Sentence

Defendant's real complaint here is with the sentence. However, there is nothing about the sentence which presents a viable issue for appeal.

No issue is raised in this case regarding the computation of the applicable Guideline range. The 63 month sentence imposed was within the applicable

Guideline range and thus is not reviewable on appeal, *United States v. Solis*, 923 F.2d 548, 551 (7th Cir. 1991).

At the time of this offense Defendant was on parole for possession of cocaine with intent to distribute. Indeed, this same parole had been revoked twice previously. The Court imposed a consecutive sentence in this case because the Defendant's parole was revoked based on this same conduct, and the Court felt that an "incremental increase" in the time of confinement was required to punish Defendant for violating his parole, *Sentencing Transcript* at 10. Defendant contends it was an abuse of discretion to impose a consecutive sentence in this case.

"There is a strong presumption in favor of consecutive sentencing when as in this case the offense was committed while the defendant was on parole," *United States v. Walker*, 98 F.3d 944, 945 (7th Cir. 1996), *cert. denied*, 117 S.Ct. 1012, 136 L.Ed.2d 889 (1997). Moreover, application note 6 to U.S.S.G. §5G1.3(c) states that a sentence should be imposed consecutively when the underlying offense formed the basis for a parole revocation "in order to provide an incremental penalty for the violation" of parole. That is precisely what the Court did here, and such exercise of discretion has been acknowledged as appropriate by this Court, *United States v. Smith*, 80 F.3d 1188, 1192 (7th Cir. 1996). Additionally, the presentence report indicates at page 9 that Defendant will reach his mandatory release date on the parole revocation on December 22, 1997. Thus the "incremental time" to be served by the Defendant as the result of the parole

revocation and the consecutive sentence in this case is less than a year from the date of the violation. There is no possibility that this Court would find the imposition of a consecutive sentence in this case to have been an abuse of discretion.

Additionally, Mr. Niemeier asserts that his attorney was ineffective for "allowing" his parole to be revoked before the sentencing in this case. Defendant believes that had he been sentenced in this case before his parole was revoked, a consecutive sentence could not have been imposed. This is simply incorrect. The Court has the discretion to impose a sentence concurrently or consecutively to the prior sentence, 18 U.S.C. §3584(a). As this Court's decision in *Smith* demonstrates, a district court has the discretion to sentence consecutively either before or after an underlying parole is revoked, *United States v. Smith*, 80 F.3d at 1192.

Additionally, it is not at all clear how defense counsel could have done anything to prevent or compel the parole revocation to proceed before the sentencing for the new offense. This is not a matter within the control of defense counsel.

Given the Defendant's prior failures on parole, the consecutive sentence here was well within the District Court's discretion. Any appeal based on the sentence would be frivolous.

D. Ineffective Representation of Counsel

Mr. Niemeier has alleged that his attorney was ineffective, but the only bases for such assertion are that: (1) counsel did not attack the constitutionality of the statute pursuant to which he was convicted; and (2) counsel did not prevent him from getting a consecutive sentence. However, neither of these issues has merit, as demonstrated above. The statute pursuant to which Defendant was sentenced is constitutional, and the sentence could not be said to be an abuse of discretion nor could defense counsel delay the parole revocation.

In this case the Defendant was caught "red handed" possessing weapons while he was on parole. Defendant's factual guilt appears beyond doubt. Given this was Defendant's third parole violation, defense counsel negotiated the best "deal" he could with the Government to obtain an "acceptance of responsibility" downward departure at sentencing.

Other than suggesting the foregoing--meritless--contentions supporting his claim of ineffective representation, Mr. Niemeier has shown neither that his trial attorney's conduct was outside the range of reasonableness nor that he was prejudiced by anything counsel did. There is no basis to claim ineffective representation of trial counsel.

CONCLUSION

There is nothing to appeal in this case. The Defendant was factually guilty; the statute pursuant to which he was convicted is constitutional; the guilty plea is pristine; and the sentence imposed was well within the appropriate discretion of the District Court.

For these reasons, counsel has concluded that any further proceedings on behalf of the Defendant would be wholly frivolous and without arguable merit within the meaning of *Anders v. California,* 386 U.S. 738 (1967) and its progeny. For this reason counsel respectfully moves to withdraw as counsel on appeal for Larry Dean Niemeier.

Respectfully submitted,

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ATTORNEY FOR DEFENDANT-APPELLANT

APPELLANT'S APPENDIX

This appendix includes all of the material required by Circuit 30(a).

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs. **Case No. 97-2583**

LARRY DEAN NIEMEIER,

Defendant-Appellant.

MOTION FOR LEAVE TO WITHDRAW AS COUNSEL FOR DEFENDANT

Howard B. Eisenberg, the Court appointed appellate counsel for the Defendant, Larry Dean Niemeier, respectfully moves to withdraw as counsel in this case.

The reason for this request is that following a careful review of the complete court record and transcripts in this case, including the presentence report; after corresponding with the Defendant, and after researching the law as it relates to the facts of this case, counsel has concluded that any further proceedings on behalf of the Defendant would be wholly frivolous and without arguable merit within the meaning of *Anders v. California,* 386 U.S. 738 (1967) and its progeny.

Attached hereto and incorporated herein by reference is the "Brief and Appendix for Defendant-Appellant" which sets forth the bases for the foregoing conclusion.

Dated: October 16, 1998

Respectfully submitted,

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ATTORNEY FOR DEFENDANT-APPELLANT

IN THE

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vs. **Case No. 97-2583**

LARRY DEAN NIEMEIER,

Defendant-Appellant.

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO WITHDRAW AS COUNSEL FOR DEFENDANT

I. BACKGROUND

The Defendant, Larry Niemeier, was convicted in the United States District Court for the Western District of Wisconsin, after a plea of guilty, of being a felon in possession of four firearms in violation of 18 U.S.C. §922(g)(1). The Defendant, who was on parole at the time, was found in possession of four firearms on November 30, 1996 while hunting in Iowa County, Wisconsin. Upon conviction, Chief District Judge John C. Shabaz imposed a sentence of 63 months imprisonment to be served consecutively to the sentence imposed for the parole violation which occurred as a result of the same conduct which formed the basis for this conviction. Defendant filed a timely appeal, and this Court appointed the

undersigned to represent Mr. Niemeier.

Counsel has obtained the complete court record in this case, including the presentence report, and all transcripts in this case. Counsel has also corresponded with the Defendant. For the reasons that follow, counsel has concluded that any further proceedings on behalf of the Defendant would be wholly frivolous and without arguable merit within the meaning of *Anders v. California*, 386 U.S. 738 (1967) and its progeny. For this reason counsel asks leave to withdraw in this case.

II ISSUES OF POSSIBLE MERIT

A. Validity of the Guilty Plea

"[A] plea of guilty constitutes a waiver of non- jurisdictional defects occurring prior to the plea," *United States v. Robinson*, 20 F.3d 270, 273 (7th Cir.1994). There are no jurisdictional defects apparent in this record, and the guilty plea was unconditional with no pretrial issue being reserved under Rule 11(a)(2) of the Federal Rules of Criminal Procedure.

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"There is a strong presumption in favor of consecutive sentencing when as

in this case the offense was committed while the defendant was on parole," *United States v. Walker*, 98 F.3d 944, 945 (7th Cir. 1996), *cert. denied*, 117 S.Ct. 1012, 136 L.Ed.2d 889 (1997). Moreover, application note 6 to U.S.S.G. §5G1.3(c) states that a sentence should be imposed consecutively when the underlying offense formed the basis for a parole revocation "in order to provide an incremental penalty for the violation" of parole. That is precisely what the Court did here, and such exercise of discretion has been acknowledged as appropriate by this Court, *United States v. Smith*, 80 F.3d 1188, 1192 (7th Cir. 1996). There is no possibility that this Court would find the imposition of a consecutive sentence in this case to have been an abuse of discretion.

Additionally, Mr. Niemeier asserts that his attorney was ineffective for "allowing" his parole to be revoked before the sentencing in this case. Defendant believes that had he been sentenced here before his parole was revoked, a consecutive sentence could not have been imposed. This is simply incorrect. The Court has the discretion to impose a sentence concurrently or consecutively to the prior sentence, 18 U.S.C. §3584(a). As this Court's decision in *Smith* demonstrates, a district court has the discretion to sentence consecutively either before or after an underlying parole is revoked, *United States v. Smith*, 80 F.3d at 1192.

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In this case the Defendant was caught "red handed" possessing weapons while he was on parole. Defendant's factual guilt appears beyond doubt. Given this was Defendant's third parole violation, defense counsel negotiated the best "deal" he could with the Government to obtain an "acceptance of responsibility" downward departure at sentencing.

Other than suggesting the foregoing--meritless--contentions supporting his claim of ineffective representation, Mr. Niemeier has shown neither that his trial attorney's conduct was outside the range of reasonableness nor that he was prejudiced by anything counsel did. There is no basis to claim ineffective

representation of trial counsel.

III. CONCLUSION

There is nothing to appeal in this case. The Defendant was factually guilty; the statute pursuant to which he was convicted is constitutional; the guilty plea is pristine; and the sentence imposed was well within the appropriate discretion of the District Court.

For these reasons, counsel has concluded that any further proceedings on behalf of the Defendant would be wholly frivolous and without arguable merit within the meaning of *Anders v. California,* 386 U.S. 738 (1967) and its progeny. For this reason counsel respectfully moves to withdraw as counsel on appeal for Larry Dean Niemeier.

Respectfully submitted,

HOWARD B. EISENBERG

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ATTORNEY FOR DEFENDANT-APPELLANT

CERTIFICATE OF MAILING

I hereby certify that on October 16, 1998 I served a copy of the foregoing Motion and Supporting Memorandum upon opposing counsel and upon Defendant personally by mailing such document

to:

Peggy A. Lautenschlager
United States Attorney
P.O. Box 1585
Madison, WI. 53701-1585

Mr. Larry D. Niemeier
No. 02444090
P.O. Box 1000
Oxford, WI. 53952

via first class mail with postage prepaid and properly affixed at Milwaukee, Wisconsin.

Howard B. Eisenberg